

1 **ARIZONA DEPARTMENT OF FINANCIAL INSTITUTIONS**

2 In the Matter of the Removal and Prohibition
3 of:

No. 11F-BD002-BNK

4 **BERGAU, CHERYL ANN**
5 7844 W. Palmarie
6 Glendale, Arizona 85303

Respondent.

**NOTICE OF HEARING AND INTENT TO
REMOVE AND PROHIBIT FROM
FURTHER PARTICIPATION IN ANY
MANNER IN THE CONDUCT OF THE
AFFAIRS OF A FINANCIAL INSTITUTION
OR ENTERPRISE**

7 PLEASE TAKE NOTICE that, pursuant to Arizona Revised Statutes ("A.R.S.") §§ 6-138,
8 6-161, and 41-1092.02, the above-captioned matter will be heard through the Office of
9 Administrative Hearings, an independent agency, and is scheduled for January 6, 2011, at 8:00 a.m.,
10 at the Office of Administrative Hearings, 1400 West Washington, Suite 101, Phoenix, Arizona,
11 (602) 542-9826 (the "Hearing").

12 The purpose of the Hearing is to determine whether grounds exist to remove or prohibit
13 Respondent from further participation in any manner in the conduct of the affairs of a financial
14 institution or enterprise pursuant to A.R.S. §§ 6-161(A), (B), and (C), and to prohibit Respondent,
15 after a removal order has become final, from further participation in any manner as a director,
16 officer, employee, agent or other person in the conduct of the affairs of any financial institution or
17 enterprise pursuant to A.R.S. § 6-161(E).

18 Pursuant to A.R.S. § 6-138, the Superintendent of Financial Institutions for the State of
19 Arizona (the "Superintendent") delegates the authority vested in the Superintendent, whether implied
20 or expressed, to the Director of the Office of Administrative Hearings or the Director's designee to
21 preside over the Hearing as the Administrative Law Judge, to make written recommendations to the
22 Superintendent consisting of proposed Findings of Fact, Conclusions of Law, and Order. The Office
23 of Administrative Hearings has designated Lewis D. Kowal, at the address and phone number listed
24 above, as the Administrative Law Judge for these proceedings. Pursuant to Arizona Administrative
25 Code ("A.A.C.") Rule 2-19-104 and A.R.S. §§ 41-1092.01(H)(1) and 41-1092.08, the
26 Superintendent retains authority to enter orders granting a stay, orders on motions for rehearing, final

1 decisions pursuant to A.R.S. § 41-1092.08 or other order or process which the Administrative Law
2 Judge is specifically prohibited from entering.

3 Motions to continue this matter shall be made in writing to the Administrative Law Judge **not**
4 **less than fifteen (15) days** prior to the date set for the Hearing. A copy of any motion to continue
5 shall be mailed or hand-delivered to the opposing party on the same date of filing with the Office of
6 Administrative Hearings.

7 A.R.S. § 41-1092.07 entitles any person affected by this Hearing to appear in person and by
8 counsel, or to proceed without counsel when submitting evidence, to have a reasonable opportunity
9 to inspect all documentary evidence, to cross-examine witnesses, to present evidence and witnesses
10 in support of his/her interests, and to have subpoenas issued by the Administrative Law Judge to
11 compel attendance of witnesses and production of evidence. Pursuant to A.R.S. § 41-1092.07(B),
12 any person may appear on his or her own behalf or by counsel.

13 Pursuant to A.R.S. § 41-1092.07(E), a clear and accurate record of the proceedings will be
14 made by a court reporter. The transcription of the hearing proceedings by the court reporter shall be
15 the official record for purposes of the Administrative Law Judge's Recommended Decision and the
16 Superintendent's Final Decision and Order. Any party that requests a transcript of the proceedings
17 shall pay the cost of the transcript for the court reporter or other transcriber.

18 Questions concerning issues raised in this Notice of Hearing should be directed to Assistant
19 Attorney General Craig A. Raby, (602) 542-8889, 1275 West Washington, Phoenix, Arizona 85007.

20 **NOTICE OF APPLICABLE RULES**

21 On February 7, 1978, the Arizona Department of Financial Institutions (the "Department")
22 adopted A.A.C. R20-4-1201 through R20-4-1220, which were amended September 12, 2001, setting
23 forth the rules of practice and procedure applicable in contested cases and appealable agency actions
24 before the Superintendent. The hearing will be conducted pursuant to these rules and the rules
25 governing procedures before the Office of Administrative Hearings, A.A.C. R2-19-101 through
26 R2-19-122. A copy of the procedures to be followed is enclosed.

1 Pursuant to A.A.C. R20-4-1209, Respondent shall file a written answer **within twenty (20)**
2 **days** after issuance of this Notice of Hearing. The answer shall briefly state the Respondent's
3 position or defense and shall specifically admit or deny each of the assertions contained in this
4 Notice of Hearing. If the answering Respondent is without or is unable to reasonably obtain
5 knowledge or information sufficient to form a belief as to the truth of an assertion, Respondent shall
6 so state, which shall have the effect of a denial. Any assertion not denied is deemed admitted.
7 When Respondent intends to deny only a part or a qualification of an assertion, or to qualify an
8 assertion, Respondent shall expressly admit so much of it as is true and shall deny the remainder.
9 Any defense not raised in the answer is deemed waived.

10 **If a timely answer is not filed, pursuant to A.A.C. R20-4-1209(D), Respondent will be**
11 **deemed in default** and the Superintendent may deem the allegations in this Notice of Hearing as
12 true and admitted and the Superintendent may take whatever action is appropriate, including
13 suspension, revocation, denial of Respondent's license or affirming an order to Cease and Desist and
14 imposition of a civil penalty or restitution to any injured party.

15 Respondent's answer shall be mailed or delivered to the Arizona Department of Financial
16 Institutions, 2910 North 44th Street, Suite 310, Phoenix, Arizona 85018, with a copy mailed or
17 delivered to the Office of Administrative Hearings, 1400 West Washington, Suite 101, Phoenix,
18 Arizona 85007 and to Assistant Attorney General Craig A. Raby, Consumer Protection & Advocacy
19 Section, Attorney General's Office, 1275 West Washington, Phoenix, Arizona 85007.

20 **Persons with disabilities may request reasonable accommodations such as interpreters,**
21 **alternative format or assistance with physical accessibility.** Requests for accommodations must
22 be made as early as possible to allow time to arrange the accommodations. If accommodations are
23 required, call the Office of Administrative Hearings at (602) 542-9826.

24 **COMPLAINT**

25 1. Respondent Cheryl Ann Bergau ("Ms. Bergau") was employed as an escrow officer
26 by American Title Services Agency, L.L.C. ("ATS"), Mesa Branch #46, located at 2266 S. Dobson

1 Road, Suite 105, Mesa, Arizona 85202, Branch License No. #0113849, at all times material to this
2 proceeding.

3 2. ATS is licensed by the Department as an escrow agent, license number EA-0906335.

4 3. On or around January 2009, ATS conducted an audit of the files handled by Ms.
5 Bergau. The audit revealed that Ms. Bergau had misappropriated ATS funds for personal use. As a
6 result of the audit, ATS immediately terminated Ms. Bergau's employment.

7 4. ATS next contacted the Phoenix Police Department to notify them of the defalcation,
8 and prepared and provided to the Phoenix Police Department a detailed report regarding this matter.

9 5. On or about August 25, 2009, a Grand Jury Indictment was filed in *State of Arizona v.*
10 *Cheryl Ann Bergau*, Maricopa County Superior Court No. CR2009-141742-001 DT ("*State v.*
11 *Bergau*"), charging Ms. Bergau with one count of Fraudulent Schemes and Artifices, a Class 2
12 Felony, one count of Theft, a Class 2 Felony, and two counts of Forgery, a Class 4 Felony.

13 6. On or about November 19, 2009, a Plea Agreement was filed in *State v. Bergau*, in
14 which Ms. Bergau agreed to plead guilty to Count 2 (as amended), Theft, a Class 6 Felony, and
15 Count 3, Forgery, a Class 4 Felony.

16 7. On or about November 19, 2009, in *State v. Bergau*, Ms. Bergau entered her plea of
17 Guilty before the Court, to Count 2 (as amended), Theft, a Class 6 Felony, and Count 3, Forgery, a
18 Class 4 Felony. The Court ordered that the acceptance of plea and sentencing be set for January 7,
19 2010.

20 8. On January 7, 2010, in *State v. Bergau*, the Court entered Judgment, finding Ms.
21 Bergau guilty of Count 2, Theft, a Class 6 Felony, in violation of A.R.S. §§ 13-1802, 13-1801, 13-
22 701, 13-702, and 13-801, committed between November 16, 2007 and January 31, 2009; and
23 Count 3, Forgery, a Class 4 Felony, in violation of A.R.S. §§ 13-2001, 13-2002, 13-701, 13-702, 13-
24 702.01, 13-702.01, and 13-801, committed on or about April 24, 2008. The Court sentenced Ms.
25 Bergau to a nine (9) month term of imprisonment to begin on January 7, 2010, as to Count 2, and, as
26 to Count 3, sentenced her to a suspended sentence, placing Ms. Bergau on probation for a term of

1 three (3) years, upon absolute discharge from prison. In addition, as to Count 3, the Court ordered
2 Ms. Bergau to pay restitution to American Title Service Agency in the amount of twenty seven
3 thousand nine hundred eighty one dollars and fifty two cents (\$27,981.52), and a fine in the amount
4 of two thousand five hundred dollars (\$2,500.00).

5 LAW

6 1. Pursuant to Title 6, Chapter 7, of the Arizona Revised Statutes, the Superintendent
7 has the authority and duty to regulate all persons engaged in the escrow agent business and with the
8 enforcement of statutes, rules, and regulations relating to escrow agents.

9 2. By the conduct set forth above in the Complaint, Ms. Bergau has violated statutes
10 governing escrow agents as follows:

11 a. A.R.S. § 6-834(A) by failing to deposit and maintain all monies deposited in
12 escrow to be delivered on the close of the escrow or on any other contingency in a
13 bank, savings bank or savings and loan association doing business in this state and
14 by failing to keep all escrow monies separate, distinct and apart from monies
15 belonging to the escrow agent; and

16 b. A.R.S. § 6-841.01(A) by breaching, as an employee of an escrow agent, a
17 fiduciary duty as a trustee to the owner of all monies received or collected and
18 held in escrow and by knowingly and negligently commingling trust monies with
19 the escrow agent's own monies or with monies held in any other capacity.

20 3. The conduct of Ms. Bergau, as set forth above, constitutes acts, omissions, and
21 practices which demonstrate personal dishonesty and unfitness to continue in office or to participate
22 in the conduct of the affairs of any financial institution or enterprise and is grounds for removal and
23 the prohibition of Ms. Bergau from participating in any manner in the conduct of the affairs of any
24 financial institution or enterprise within the meaning of A.R.S. § 6-161(A)(1).

25 4. Ms. Bergau's January 7, 2010 conviction of one (1) count of Theft, a Class 6 Felony,
26 constitutes grounds for the removal and the prohibition of Ms. Bergau from participating in any

1 manner in the conduct of the affairs of any financial institution or enterprise, pursuant to A.R.S. § 6-
2 161(A)(4).

3 5. Ms. Bergau's January 12, 2010 conviction of one (1) count of Forgery, a Class 4
4 Felony, constitutes grounds for the removal and prohibition of Ms. Bergau from participating in any
5 manner in the conduct of the affairs of any financial institution or enterprise, pursuant to A.R.S. § 6-
6 161(A)(4).


7 6. Ms. Bergau's violations of A.R.S. §§ 6-834(A) and 6-841.01(A) constitute grounds
8 for the removal and the prohibition of Ms. Bergau from participating in any manner in the conduct of
9 the affairs of any financial institution or enterprise, pursuant to A.R.S. § 6-161(A)(6).

10 7. The violations, set forth above, constitute grounds for the Superintendent to order the
11 removal and the prohibition of Ms. Bergau from further participation in any manner as a director,
12 officer, employee, agent, or other person in the conduct of the affair of any financial institution or
13 enterprise pursuant to A.R.S. § 6-161.

14 WHEREFORE, if after a hearing, the Superintendent makes a finding of one or more of the
15 above-described violations, the Superintendent may remove and prohibit Ms. Bergau from further
16 participation in any manner in the conduct of the affairs of any financial institution or enterprise
17 pursuant to A.R.S. § 6-161(E) and may order any other remedy necessary or proper for the
18 enforcement of the statutes and rules regulating escrow agents in Arizona pursuant to A.R.S. §§ 6-
19 123, 6-131, and 6-161.

20 DATED this 19th day of July, 2010.

21 Lauren W. Kingry
22 Superintendent of Financial Institutions

23
24 By 
25 Robert D. Charlton
26 Assistant Superintendent of Financial Institutions

1 ORIGINAL of the foregoing filed this 19th
2 day of July, 2010, in the office of:

3 Lauren W. Kingry
4 Superintendent of Financial Institutions
5 Arizona Department of Financial Institutions
6 ATTN: Susan Longo
7 2910 N. 44th Street, Suite 310
8 Phoenix, AZ 85018

9 COPY mailed same date to:

10 Lewis D. Kowal, Administrative Law Judge
11 Office of the Administrative Hearings
12 1400 West Washington, Suite 101
13 Phoenix, AZ 85007

14 Craig A. Raby, Assistant Attorney General
15 Office of the Attorney General
16 1275 West Washington
17 Phoenix, AZ 85007

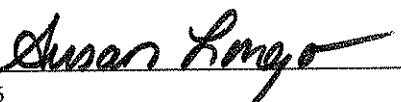
18 Robert D. Charlton, Assistant Superintendent
19 Mack Wynegar, Senior Examiner
20 Arizona Department of Financial Institutions
21 2910 N. 44th Street, Suite 310
22 Phoenix, AZ 85018

23 COPY MAILED SAME DATE by Certified Mail,
24 Return Receipt Requested, to

25 Cheryl A. Bergau
26 7844 W. Palmarie
Glendale, AZ 85303
Respondent

AND COPY DELIVERED/SERVED SAME DATE
by Process Server, to:

Cheryl A. Bergau
7844 W. Palmarie
Glendale, AZ 85303
Respondent


860516